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NOT TO BE PUBLISHED



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>LAUNDRE RANDELL CLEMON,<br><br>Defendant and Appellant. | C045008<br><br>(Super. Ct. No. 62031512) |

A jury convicted defendant Laundre Randell Clemon of two counts of grand theft (Pen. Code, § 487, subd. (a); further section references are to this code), two counts of uttering fictitious checks (§ 476), and two counts of second degree burglary (§ 459), and found that he committing the crimes while released on bail or his own recognizance in another case (§ 12022.1). He was sentenced to a state prison term of three years four months to run consecutively to a term imposed in another case.

On appeal, defendant contends the trial court committed instructional and sentencing error, and there is insufficient evidence to support one of the convictions for grand theft. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2002, defendant went into a jewelry store and bought a man's ring for $402.17. He paid for the ring with a check written on his bank account that had been overdrawn and closed for nearly five years. He initialed a sales slip with the name and address on the check.

The next day, defendant brought a woman into the jewelry store and bought two more rings, again paying by check drawn on his closed account. Before defendant picked up the receipt, the owner discovered the check was drawn on a long-closed account. Defendant left with the rings. The owner called the police and followed defendant.

Roseville police recovered one ring and partial checkbooks from defendant's pockets.

Defendant's mother testified she told him before the thefts that she was going to deposit more than $1,000 into his account but forgot to do so.

DISCUSSION

I

Defendant contends the trial court "irremediably confused the jurors" by modifying CALJIC No. 2.61 (the right of a defendant to rely upon the evidence and not to testify) by inserting a sentence from CALJIC No. 2.72 (the need for a corpus delicti to be proved

before a confession or admission is considered). As we will explain, although the court's combination of instructions was erroneous, they did not lower the prosecution's burden of proof as defendant claims.

When reading the instructions, the trial court inexplicably instructed the jury:

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove beyond a reasonable doubt every essential element of the charge or charges against him.

"No lack of testify [*sic*] on the defendant's part will make up for a failure of proof by the People so as to support a finding against him on any such essential element. *No person may be convicted of a criminal offense unless there is some proof of each element of the crime.*

"And in just a moment, I'll be telling you about the alleged crimes and going through the elements one by one. *The identity of the person alleged to have . . . committed a crime is not an element of the crime."* (Italics added.)

Thus, the trial court began with CALJIC No. 2.61, properly instructing the jury that a defendant need not testify and then, for unknown reasons, jumped to CALJIC No. 2.72.[1]

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[1] Fidelity to the actual language of CALJIC instructions and the guidance provided by the accompanying Use Notes is always the better approach. Deviation from the norm is quite often confusing and invites trouble, in addition to unnecessary litigation.

We determine the correctness of jury instructions by examining the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Burgener* (1986) 41 Cal.3d 505, 538.) We also presume that the jury is capable of following the instructions as given. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1337.) "[N]ot every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is '"whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process."' [Citations.] '"[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations]. If the charge as a whole is ambiguous, the question is whether there is a '"reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citations.]" (*Middleton v. McNeil* (2004) 541 U.S. ___, ___ [158 L.Ed.2d 701, 707].)

We agree with defendant that no portion of CALJIC No. 2.72 was applicable to this case because no confession or admission was in evidence. We also agree the "some evidence" requirement for the corpus delicti is different than the beyond a reasonable doubt standard for conviction.

However, defendant was not prejudiced by the trial court's instructional error. The jury was properly instructed with definitions of reasonable doubt, the presumption of innocence, and the burden of proof, and it was told to disregard inapplicable instructions. (CALJIC Nos. 1.01, 2.90, 17.31.) Considering the

entire charge of the court, the jury would not have understood the incorrect instructions to allow a conviction without the prosecutor having proved each element of the charges beyond a reasonable doubt. In other words, the erroneous inclusion of parts of CALJIC No. 2.72 was harmless.

II

Defendant claims there was insufficient evidence that he committed the theft in count one by false pretenses. Specifically, he asserts that larceny by false pretenses "requires a false representation beyond the passing of a false check" (caps. omitted) and that there was no evidence he made either a note or memorandum in writing, or orally, in addition to the check.

"'To determine sufficiency of the evidence, we must inquire whether a rational trier of fact could find defendant guilty beyond a reasonable doubt. In this process we must view the evidence in the light most favorable to the judgment and presume in favor of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. To be sufficient, evidence of each of the essential elements of the crime must be substantial and we must resolve the question of sufficiency in light of the record as a whole.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 387, quoting *People v. Johnson* (1993) 6 Cal.4th 1, 38; see *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [61 L.Ed.2d 560, 572-574].)

Section 532, subdivision (b) provides certain requirements for the elements of theft by false pretenses as reflected in CALJIC No. 14.14, given as follows:

"The defendant cannot be convicted of theft by false pretenses unless:

"Number one, that false pretense or some note or memorandum thereof is in [a] writing subscribed by the defendant or is in his handwriting.

"Or, number two, on [*sic*] oral false pretense is accompanied by a false token or writing."[2]

Defendant argues there was insufficient evidence because the check itself may not be considered as a writing subscribed by defendant that accompanies the false representation, citing *People v. Mason* (1973) 34 Cal.App.3d 281, at page 288 (hereafter *Mason*).

Assuming for purpose of discussion that *Mason* was decided correctly, we conclude that the prosecution presented substantial evidence of a writing subscribed by defendant which accompanied defendant's false pretense. The store manager testified that she put defendant's check address on the sales slip, not the address on his identification card, because it was her practice to ask a customer which address to use. Defendant initialed the sales slip at the time he provided the false check and received the ring. This suffices as a false writing, other than the check, subscribed by defendant that accompanied his false representation and, thus, that supports his conviction for the theft by false pretenses.

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[2] The court struck, as inapplicable to the facts of this case, a third option set forth in CALJIC No. 14.14, i.e., "The false pretense is proved by the testimony of two witnesses or that of one witness and corroborating circumstances."

III

Defendant argues the trial court erred by giving CALJIC No. 2.03 over defendant's objection, as follows: "If you find before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt[.] However, that conduct is not sufficient by itself to prove guilt, and the weight and significance, if any, are for you to decide."

The prosecutor sought the instruction because the store manager testified that if there were discrepancies between the addresses on the check and on the identification, she would ask the customer which address to use on the sales slip. The prosecutor stated that the address on the sales slip that matched the address on the check must have been provided by defendant and was a lie. Defense counsel objected to the instruction, arguing that it was unsupported by the evidence, referring to statements made in the jewelry store.

On appeal, defendant contends the statements relied upon by the prosecutor were "operative facts of the commission of the crimes" and, thus, were not "false statements showing a consciousness of guilt which are the subject of CALJIC No. 2.03." However, defendant did not object on this ground at trial.

In any event, defendant was not prejudiced by CALJIC No. 2.03, which is a cautionary instruction designed to benefit defendants. (See, e.g., *People v. Kipp* (1998) 18 Cal.4th 349, 375; *People v. Arias* (1996) 13 Cal.4th 92, 142.) As the People point out in the brief, "the 'cautionary nature' of the instruction . . . provid[ed]

a benefit to which [defendant] was not entitled" because "[i]f [his] premise is correct, the false statement by [him] showed his *guilt* of the crime, not just *consciousness* of guilt." (Orig. italics.)

IV

The trial court ran the sentences on counts one and four consecutively to the sentence already imposed in Sacramento County case No. 0105631, adding 16 months to the three-year term imposed, as required by section 12022.1, subdivision (e). The court then imposed a consecutive term of two years under section 12022.1, subdivision (b) because the jury found that defendant had been released on his own recognizance in the Sacramento County case when he committed these crimes.

Defendant claims the trial court should have imposed only one third of the two-year term because, he argues, section 12022.1 is an "enhancement" under section 1170.1. We are not persuaded.

Section 12022.1 provides a specific, mandatory consecutive sentencing scheme, requiring the primary and secondary offenses to be run consecutively. "Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, . . . and a consecutive term of imprisonment is imposed . . . the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements." (§ 1170.1, subd. (a).)

Section 1170.11 provides a statutory definition of "specific enhancements": "As used in Section 1170.1, the term 'specific enhancement' means enhancements that relate to the circumstances of the crime." Section 1170.11 goes on to list each included enhancement by statute. Section 12022.1 is not included among the enhancements listed in section 1170.11 because it does not relate to the circumstances of the crime. (See *People v. Garrett* (1991) 231 Cal.App.3d 1524 [§ 12022.1 was not an included enhancement under earlier version of section 1170.1].)

Hence, under section 1170.1, subdivision (a), the two-year sentence for a section 12022.1 violation is added as a separate "additional term" component, and is not subject to the one-third limit.

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

BLEASE, J.

DAVIS, J.